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No. 88-1546

In The

Supreme Court of the United States

October Term, 1988

PACIFIC MUTUAL LIFE INSURANCE COMPANY, et al.,

Petitioners,

v.

HARRIETTE TURNBOW,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Nevada

RESPONDENT'S BRIEF IN OPPOSITION

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OPINION BELOW

The opinion of the Supreme Court of Nevada is reported at 104 Nev Adv Op 109 and 765 P.2d 1160 (1988).

STATEMENT OF THE CASE

A. The Facts

HARRIETTE TURNBOW ("TURNBOW"), is a sole proprietor of a retail liquor store and business in Yerington, Nevada, known as "The Bottle Stop". In 1974 she decided to obtain comprehensive major medical insurance primarily for her and her daughter Yvonne Rotchy. She consulted with her insurance agent John F. McGowan ("MCGOWAN") and he recommended and she purchased the *"American Series Plan"* of a comprehensive major medical insurance issued under the name of B.E.S.T., an acronym for Beneficial Employees Security Trust. The original booklet describing her health insurance defined a "Subscribing Employer is an employer that has two or more eligible employees and that subscribes to the trust agreement providing this insurance".

The *American Series Plan* of B.E.S.T. health insurance is a multiple employer trust known in the insurance industry as a "MET". MET's are an insurance vehicle which offers employers with small groups of employees (usually under ten) the opportunity to obtain health insurance benefits at group rates by pooling these employees and then presenting them to an insurance

company as a large group.[1] In this case the B.E.S.T. plans were underwritten and claims were paid by Pacific Mutual Life Insurance Company.

The B.E.S.T. policy provided that TURNBOW had $1,000,000.00 worth of comprehensive major medical coverage with a $200.00 per year deductible. TURNBOW faithfully paid her insurance premiums from November 1, 1974 until August, 1981 with the premiums remaining relatively stable during that seven (7) year period.

In August, 1981 TURNBOW suffered a major stroke, the results of which today she is considered permanently and totally disabled. She has been and is currently institutionalized at the Lyon County Health Center in Yerington, Nevada.

Shortly after TURNBOW suffered her stroke and submitted claims, the premiums on her B.E.S.T. health policy began to dramatically increase; to-wit, in less than a year and one half the premiums rose in excess of 372% from $190.00 per month to $1,256.00 per month. In April and May, 1983, TURNBOW's daughter Yvonne Rotchy received notification from B.E.S.T. that there would be further premium increases that would occur at an accelerated rate. Rotchy understood the premium was going to double from $1,256.00 per month to approximately $2,500.00 per month. Rotchy contacted MCGOWAN informing him that TURNBOW could no longer afford to pay

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[1] Please note that multiple employer trusts [MET's] are not in any way related to the term multiemployer plans, funds or programs described in ERISA; those plans, funds or programs concern union members who typically work for several employers during the course of a year.

those premiums and inquired as to what action to take. As a result of her discussions with MCGOWAN no further premiums were paid from May, 1983 on. The medical, hospital, convalescent and other health providers expenditures which previously had been covered by B.E.S.T. became so excessive it financially destroyed TURNBOW and her business "The Bottle Stop".

The gravamen of TURNBOW'S position is that she was to receive $1,000,000.00 in benefits. B.E.S.T. cut off her benefits after paying approximately $46,000.00, assigning as a cause for termination of the benefits that she had to receive all benefits she was entitled within a two-year period, according to the insurance policy. TURNBOW maintains that no such provision was contained in the "brochure" which induced her to purchase the insurance, and, even if the insurance contract contained such language, it was ambiguous.

B.E.S.T. and PACIFIC MUTUAL also embarked on a course of *"creaming"* the good risks in the *American Series Plan*. The *American Series Plan* was operating under a California trust. B.E.S.T. and Pacific Mutual set up a competing trust in Missouri naming that B.E.S.T's *Preferred Series Plan*. B.E.S.T. then actively solicited from insureds in the *American Series Plan* seeking them to switch from the *American Series Plan* to the *Preferred Series Plan*.

"Creaming" is an actuarial term whereby an insurance company entices or removes the healthy people or good insurance risks out of the insurance pool thus leaving only the sick insured or bad insurance risks in the plan. As is obvious, with only sick insureds and bad risks in

the remaining insurance pool the premiums rise geometrically and self-destructs when those remaining insureds cannot afford the premiums.

TURNBOW, with her pre-existing stroke and related medical problems, was ineligible to transfer to the *Preferred Series Plan* and ultimately failed to pay premiums and lost her coverage under the existing *American Series Plan*.

TURNBOW also takes the position that her rights vested when she was felled by her stroke (her policy was in good standing at that time). B.E.S.T., in addition to the reason that TURNBOW must receive her $1,000,000.00 in benefits within a two-year period, also assigned as a reason for cancellation the failure to pay the phenomenal increase in premiums.

B. Procedural History

This matter was originally filed in the First Judicial District Court of Nevada and was subsequently removed by Petitioners to Nevada Federal District Court (Case No. CV-R-85-427-ECR). During the course of discovery it was discovered that B.E.S.T., in coordination with Pacific Mutual, was an umbrella of eight (8) separate entities and were all controlled by the trustee of B.E.S.T. Mr. Donald R. Lawrenz, his family or his partners; those eight (8) entities being:[2]

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[2] Please note that petitioners, for the first time during this litigation, as mandated by Rule 28.1, revealed two (2) more subsidiaries and affiliates, those being BEST Pro-tec, Inc., and BEST Benefit Payment, Inc., not previously disclosed to Respondent.

FOUR MULTI-EMPLOYER TRUSTS

1. California Trust
2. Missouri-Nationwide Trust
3. Missouri-New York Trust
4. Utah Trust

BENEFICIAL ADMINISTRATION COMPANY

a California Company that was in charge of the administration of the claims.

PENSION ADMINISTRATORS INC.

a California Corporation in charge of marketing and promotional matters.

B.E.S.T. LIFE ASSURANCE COMPANY OF CALIFORNIA

a reinsurance company for B.E.S.T. that works in conjunction with PACIFIC MUTUAL in underwriting the policies.

B.E.S.T. EMPLOYERS ASSOCIATION, INC.

a mandatory non-profit association that assessed fees on each of the employers and lobbied for and sent out material of concern to subscribing employers.

On February 3, 1987 TURNBOW, through discovery, found additional defendants and moved to amend her complaint bringing in JOHN C. MCGOWAN and PENSION ADMINISTRATORS INC. U. S. District Judge Edward Reed granted the Motion To Amend Complaint and remanded the case back to the Nevada First Judicial District Court.

C. Trial Court Dismissed Case Based On Erisa Preemption

On the same day, as the First Amended Complaint was filed, Petitioners moved to dismiss the action based on the fact that the Employee Retirement Income Security Act of 1974 ("ERISA") preempted TURNBOW's causes of action. This was the first time that ERISA had been brought up during the over two years of litigation.

After being briefed and argued, District Judge Michael R. Griffin treated the motion to dismiss as a motion for summary judgment and granted the motion without prejudice. TURNBOW moved to reconsider or in the alternative to allow her to amend the complaint to assert an ERISA cause of action or to have the case remanded back to the Federal Court. The judge denied that motion to reconsider which effectively dismissed TURNBOW's complaint with prejudice.

D. Nevada Supreme Court Unanimously Reverses

TURNBOW appealed both the Order Granting Summary Judgment and Order denying her Motion For Reconsideration to the Nevada Supreme Court. Both of those Orders are attached to Petitioner's Appendix at Pg 6a-7a and 8a respectively.

The Supreme Court of Nevada properly reversed the District Court holding that *employee welfare benefit plan* under ERISA had not been created and that TURNBOW did not qualify as a participant or beneficiary in an ERISA plan within the meaning of ERISA.

REASONS FOR DENYING THE WRIT

1. Recent Case Of Morash Is Dispositive Of Issue

Petitioner's try and paint a picture of circuits in disarray, congressional intent violated and State Courts attempting to circumvent this Court's holding in *Pilot Life Ins. Co. v. Dedeaux*, 481 US 41 (1987), that simply is not the case.

On April 18, 1989 this Court in *Massachusetts v. Morash* ___US___, 57 Law Week 4429, 49 CCH S.Ct. Bull pg B2095 (No 88-32) construed that unused vacation time does not constitute an *employee welfare benefit plan* within the meaning of ERISA. This Court looked to the whole of the ERISA act stating:

> 'that in expounding a statute, we [are] not . . . guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy'. Pilot Life Insurance Co. v. Dedeaux, 481 U. S. 41, 51 (1987). *In enacting ERISA, Congress' primary concern was with the mismanagement of funds accumulated to finance employee benefits and the failure to pay employees benefits from accumulated funds.* California Hospital Assn., supra, at 859. To that end, it established extensive reporting disclosure, and fiduciary duty requirements to insure against the possibility that the employee's expectation of the benefit would be defeated through poor management by the plan administrator. Because ordinary vacation payments are typically fixed, due at known times, and do not depend on contingencies outside the employee's control, they *present none of the risks that ERISA is intended to address.* If there is a danger of defeated expectations, it is not different from the danger of defeated expectations of wages for services performed – a danger Congress chose not to regulate in ERISA. (emphasis added)

Like unused vacation pay the bare purchase of health insurance especially by a sole proprietor of a business does not by itself constitute an ERISA plan.

Petitioners make reference to *Fort Halifax Packing Co v. Coyne* 482 US 1 (1987) stating that ERISA was intended by Congress to replace a patchwork of state and local rules concerning employee benefit plans. This Court's latest admonition expressed in *Massachusetts v. Morash*, supra states:

> "Absent any indication that Congress intended such far-reaching consequences, we are reluctant to so significantly interfere with 'the separate spheres of governmental authority preserved in our federalist system.' " id at 49 CCH S.Ct Bull Pg. B2108.

Per *Morash*, ERISA cannot interfere with state law unless the object of that inference is a risk or danger to employees which Congress intended to address. In this case at bar, TURNBOW is the owner and procurer of the very health insurance policy in question. Congress never intended to extend ERISA coverage to a sole proprietor who merely purchased health insurance. For this Court to say "yes", there is, ERISA coverage on the bare purchase of health insurance would put employers throughout the United States to the choice of complying with the statute's detailed requirements for reporting and disclosing or not buying health insurance for their employees.

2. Case Turned On Own Facts; Affect Few Litigants.

The Nevada Supreme Court in making its ruling had to rely upon the record made by the district court on its summary judgment ruling. No trial has occurred in the

underlying action. No finder of fact has made any determination of what TURNBOW intended when she purchased health insurance for her and her daughter.

The Nevada Supreme Court decision does not attempt to deviate from central holding of *Pilot Life Ins. Co. v. Dedeaux* 481 US 41 (1987). Viewed in its most common denominator the Nevada Supreme Court says that ERISA does not apply to the bare purchase of group health insurance by an aggrieved sole proprietor of a business. That effects few litigants contrary to petitioners expansive claims.

CONCLUSION

For the forgoing reasons the petition for a writ of certiorari should be denied.

Respectfully Submitted,

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